

Supreme Court, U. S.

FILED

MAY 4 1978

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. **77-1228**

CECIL K. NICKELL - - - - - **Petitioner**

versus

UNITED STATES OF AMERICA - - - **Respondent**

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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May it please the Court:

In its Brief in Opposition, the United States agrees that “. . . [n]otes and reports of law enforcement agents are of course subject to production under Section 3500 if the requirements of the statute are otherwise satisfied” (Brief in Opp., p. 5). The main thrust of the Government’s argument revolves solely around the relevancy of the “302” form. If the Court were to accept the strained logic put forth by the Government in its Brief, then the prosecution would, in fact, be dictating to the trial court what is and what is not

relevant. Surely this Court has no intention of endorsing any such activity.

The Petitioner submits that it is within the province of the trial judge to make the determination as to relevancy—not the prosecution. It is within the province of the trial judge to determine whether requested material falls within the confines of the Jencks Act—not the prosecution. As previously mentioned, the trial judge refused to order production, refused to inspect in camera, and refused to preserve for appellate review the 302 forms in question. This action or inaction by the trial judge seriously prejudiced Petitioner's entitlement to a fair trial.

In a quite recent case from the United States Court of Appeals for the Fifth Circuit, *United States v. Judon*, 567 F. 2d 1289 (5th Cir. 1978), said Court vacated a conviction near identical to the one at bar and remanded the case to the District Court for a determination as to whether certain 302 reports were subject to production under the Jencks Act. Specifically, the Court of Appeals *directed* the District Court to make the determination based on extrinsic evidence of the circumstances surrounding the making of the 302's.

Because we are unable to determine from the face of the 302's whether they are "statements" required to be produced by the Jencks Act, *we remand to the district court to make that determination based on extrinsic evidence of the circumstances surrounding the making of the 302's*. Id. at 1290.

The Court further held that if the District Court concluded that the government should have been required

to deliver the 302's to the defendant, said Court should vacate the judgment of conviction and give the defendant a new trial.

If the court concludes that the government should have been required to deliver the 302's to Judon, *then the court should vacate the judgment of conviction and give Judon a new trial*. Id. at 1293.

Unfortunately, in the case at bar the 302's were not preserved for Appellate review as requested by defense counsel. Thus, a proper determination of relevancy could not be made upon appeal.

The Petitioner has no desire to "roam at will through government files" or to go on a "fishing expedition" as is suggested by Respondent. The Petitioner does desire to be provided with information which will allow the preparation of an adequate defense and which will reduce, if not eliminate, surprise or "ambush" at trial.

For the above stated reasons, as well as those contained in the Petition for Writ of Certiorari, Certiorari should be granted and the judgment reversed.

Respectfully submitted,

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